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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE

ORESTE PICCIONI,

Plaintiff and Appellant,

vs.

EMILIO SEGRE and OWEN CHAMBERLAIN,

Defendants and Respondents.

1 Civil 35269

(Sup. Ct. No. 425000)

This is an appeal from a judgment following the sustaining of a demurrer without leave to amend. The events causing the claimed injury and damages to plaintiff by defendants occurred in 1954 and 1955, some 17 years prior to the filing of the complaint on June 14, 1972.

The facts alleged by appellant may be summarized as follows: Appellant and respondents are physicists of recognized ability and with extensive scientific backgrounds and training. The scientists at the Lawrence Radiation Laboratory of the University of California at Berkeley had developed a machine called the Bevatron. It was to be used by the University of California scientists to perceive the actual being of the antiproton, a particle of matter whose existence had been postulated but not proven.

Appellant had designed an experiment which he was convinced if used at the Lawrence Radiation Laboratory on the Bevatron machine would demonstrate the existence of the antiproton. In 1954 he had discussions relative to his theories with respondents who were working on the antiproton. As a result of these conversations, appellant disclosed to respondents the details of his proposed experiment with the understanding that he would be permitted to work with them in the use of the Bevatron machine in a joint effort to demonstrate a means to perceive the antiproton. It was also understood that if his ideas and recommendations were a major contribution in the discovery of the antiproton that he would be accorded recognition for his part in the success of the experiment. Respondents, however, refused to allow appellant to take part in the project and in October 1955, respondents performed the experiment substantially as devised and revealed to them by appellant and thereafter were recognized as the first men to observe the antiproton. On or about October 24, 1955, respondents wrote a letter to the Physical Review, a prestigious scientific journal, setting forth the experiment and announcing the observation of the antiproton. This letter which was published in the Physical Review did not acknowledge appellant's contribution to the proof of the antiproton except to state that, among others to whom thanks were due, "Dr. O. Piccioni had made very useful suggestions in connection with the design of the experiment." In December 1959, respondents were awarded the Nobel Prize for the experiment which resulted in the observation of antiprotons. Again appellant's contribution

was acknowledged. Subsequent to respondents' publication of the results of the experiment, respondents cautioned appellant against making public disclosures of his contributions, stating that if he did so, he would be denied access to the facilities of the Lawrence Radiation Laboratory and promising that he would be granted favors if he would refrain from making public disclosures.

Based upon the above allegations, appellant set forth six causes of action as follows: First, that respondents breached an express contract, made during 1954, that appellant would be allowed to participate in the antimatter project; second, that respondents breached an implied agreement, also arising before the experiment, that appellant "would be given recognition for his substantial contribution to the experiment"; third, that by using in their experiment certain design concepts and ideas appellant originated, and by publishing the results of their work, respondents infringed upon appellant's proprietary rights in those design concepts and ideas; fourth, that by permitting themselves to be honored by the world of science as the discoverers of the antiproton, and in particular by having accepted the 1959 Nobel Prize, respondents unfairly competed with appellant in the "business" of physics research and teaching; and fifth and sixth, that respondents defamed appellant by publishing and lecturing about their 1955 experiment without adequately crediting appellant with authorship.

The trial court sustained a demurrer to this complaint on all grounds urged by respondents, i.e., statute of limitations, laches, impossibility of compliance with Code of Civil Procedure

section 429.30, subdivision (b), abstract ideas not protected, federal preemption of law relating to protectible inventions, language complained of not defamatory, no written undertaking under Code of Civil Procedure section 830 and fatally speculative damage allegations. Following two attempts to cure the deficiencies, leave to amend was denied. In reaching our conclusions here, we have considered the allegations set forth in the proposed third amended complaint as well as the previous pleadings.

The gist of appellant's grievance against respondents is their use of his idea or design to facilitate the discovery of antimatter. At the time appellant submitted this idea to respondents, the idea had not been reduced to writing but was revealed orally to respondents. To the extent that appellant bases his theory of recovery on common law copyright principles, as he does in the third and fourth causes of action, he is precluded from recovery by the fact that his idea or design was not reduced to concrete form at the time he revealed it to respondents.

"The plaintiff must establish, as the subject of the cause of action, a right in the nature of property which is capable of ownership. Certainly, if the only product of the writer's creative mind is not something which the law recognizes as protectible, that is, an idea not reduced to concrete form (citation), no right of action for infringement of literary property will lie even if the idea assertedly infringed is original and the result of his independent labor." (Golding v. R.K.O. Pictures, Inc. (1950) 35 Cal.2d 690, 695.) Although the court in

Golding was enunciating this principle in the context of a literary as opposed to a scientific product, the copyright law in California applies to both. (See Civ. Code, § 980; Smith v. Paul (1959) 174 Cal.App.2d 744, 746.)

The substantive requirement of concrete form is reflected in the pleading requirement that a writing be attached to the complaint. Thus, Code of Civil Procedure section 429.30, subdivision (b) [formerly section 426, subd. 3], provides that "If the complaint contains a demand for relief on account of the alleged infringement of the plaintiff's rights in and to a literary, artistic, or intellectual product, there shall be attached to the complaint a copy of the production as to which the infringement is claimed and a copy of the alleged infringing production. If, by reason of bulk or the nature of the production, it is not practicable to attach a copy to the complaint, that fact and the reasons why it is impracticable to attach a copy of the production to the complaint shall be alleged; . . ."

Appellant takes the position that the requirement of concrete form is merely a requirement that the idea sought to be protected is one which is not too abstract to be embodied in a writing or other material form and that the requirement of section 429.30, subdivision (b), may be met by a writing prepared after the alleged disclosure and infringement. Thus, he refers to the fact that as he told respondents his idea, they wrote it down. It is clear from the pleadings that appellant did not give to the respondents any writing or material embodiment of his idea and

that the attachments to the complaint were prepared by appellant subsequent to the events complained of.

Aside from the fact that the substantive law of common law copyright requires a tangible property, the practical necessity for the rule of section 429.30, subdivision (b), is obvious. In an action for misappropriation or interference with intellectual property, a crucial issue is "similarity" and "originality," and these issues are raised for an initial determination by the trial court at the outset of litigation by general demurrer. "Having both productions before it in accordance with section 426(3) [now section 429.30, subd. (b)], the court may determine whether there is substantial similarity between them. If, as a matter of law, there is no such similarity, no question of fact is in issue and the demurrers to each count of the complaint were properly sustained." (Weitzenkorn v. Lesser (1953) 40 Cal.2d 778, 791.) Appellant in Weitzenkorn had argued that "[t]he only purpose of the statute . . . is to protect the defendant in such an action from an attempt to prove a fraudulent claim by presenting upon the trial a production created after the action was commenced." (40 Cal.2d at p. 785.) The court, while not rejecting this purpose, went on to state that the statute was not so limited as appellant contended.

Because of the conclusion that appellant had no protectible property interest in his idea due to its oral state, it is unnecessary to discuss respondents' further arguments that the idea was not protectible by means of this suit because of federal

preemption in the areas of inventive ideas and nuclear technology.

While appellant's complaint fails to disclose a proprietary right which would be the subject of common law copyright protection, we recognize, as did the court in Weitzenkorn (see 40 Cal 2d at p. 792), that parties may contract with reference to an idea even though that idea is not protectible as property under common law copyright protection. Respondents here could have agreed to allow appellant to participate in the experiment and to receive credit for authorship, as he alleges, in return for access to his ideas, and the agreement, whether express or implied, would be enforceable regardless of whether those ideas were ever written down and regardless of the extent to which those ideas were ultimately used. If such were the contract, it would not be necessary to allege any aspect of infringement and the requirement of section 429.30, subdivision (b), would not apply.

Although it is concluded that appellant alleged such a contract in his first complaint sufficiently to resist a general demurrer, it is also concluded that any cause of action in contrac was barred by the statute of limitations. In his first complaint, appellant alleged that respondents breached their contract by refusing to allow him to take part in the project to prove the exist ence of antimatter.* This breach occurred about October 1955,

* Respondents argue that the appellate court may not consider causes of action based upon contract and defamation because they must be considered abandoned by failure to include them in the amended complaint. We recognize the general rule that an amended pleading supplants all prior complaints. Any intent to abandon these claims is denied by appellant and since there is authority to the contrary (see Cothran v. San Jose Water Works (1962) 58

giving appellant two years to bring a cause of action on an oral contract. (Code Civ. Proc., § 339, subd. (1).) Appellant did not file suit until June 1972. This delay of almost 17 years is explained in the second amended complaint as due to a combination of threats and promises. In 1955, respondents allegedly threatened appellant that they would use their power to exclude him from working at the Radiation Laboratory and on the Bevatron if he complained about the events surrounding the experiment or give them "trouble." It is alleged that soon afterward Dr. McMillan, Associate Director of the Laboratory, also intimated that appellant would be hurt in his position at Berkeley if he did not "cooperate," as did Professor E. L. Lawrence, Director of the Laboratory, and Professor Alvarez. Appellant also alleged a promise in the statement of respondent Segre to him, apparently in 1959, that "the anti-proton experiment is not the best idea you have had; you will do many other things and my friendship will be worth more to you than making trouble." Appellant alleges that this was not only a threat but a promise implying that he "would possibly be recommended for just recognition in the future through the influence of the powerful Berkeley group." The possibility that respondents Segre and Chamberlain would offer a remedy existed, according to the complaint, until the present time.

It is concluded that the facts alleged in the second amended complaint and the facts which appellant stated in his motion

Cal.2d 608, 613), we do not consider that we are precluded from considering whether appellant could state a cause of action for breach of contract.

to vacate would have been alleged in a third amended pleading are not sufficient to constitute an estoppel. In California, duress will not toll the statute of limitations (Marshall v. Packard-Bell Co. (1951) 106 Cal.App.2d 770, 774), nor will promises if the plaintiff does not act as a reasonably prudent person in assessing and relying upon the promise. "It is the rule that: 'If one by fraudulent acts or misrepresentations induces another to delay bringing suit upon his cause of action until after the expiration of the statutory period, he is estopped to take advantage of the defense that the cause of action is barred. To have this effect it must appear that the misrepresentation was one of fact, unless there exists a confidential relationship between the parties, that the misrepresentation was relied on, and that diligence to ascertain the truth was used.' (16 Cal. Jur., pp. 576, 577, sec. 172.)." (Wright v. Redwood Theatres, Inc. (1942) 49 Cal.App.2d 403, 407; see also Kunstman v. Mirizzi (1965) 234 Cal.App.2d 753, 757.)

In this case, there was no express promise but only one implied from the vague statement that respondent Segre's "friendship will be worth more to you than making trouble." Reliance on such a vague hope for over a dozen years could hardly be considered reasonable. Furthermore, the complaint itself refutes reliance upon these promises as inducing the delay in filing suit. Rather, appellant alleges that until the 1970's when "a new climate of opinion emerged," he had no hope of success in pursuing his claim and feared any effort to do so would jeopardize his career.

Appellant's reasons for not bringing suit may have been based on sound judgment and irrefutable reasoning. Reasons, however compelling and logical, do not toll the statute of limitations unless they constitute legal excuse. Herein exists the underlying justice of the statutes of limitation which seem gallingly unjust to appellant. It is manifestly unjust to prospective defendants to require them to defend against stale claims unless their own actions reach the level of an estoppel.

The bar of the statute of limitations applies to all causes of action despite the fact that in his second amended complaint appellant alleges that his remedies at law are inadequate and consequently prays for injunctive relief against respondents. The nature of the right sued upon, not the form of the relief demanded, determines the applicability of the statute of limitations. (Jefferson v. J. E. French Co. (1960) 54 Cal.2d 717, 718.) Furthermore, even an equitable action for which no other limitation is specified would be barred in four years under Code of Civil Procedure section 343.

Because of the bar of the statute of limitations, it is unnecessary to discuss the substantive law which precludes an action under the facts alleged based on theories of defamation and unfair competition. Suffice it to say that such actions will not lie.

We note that after judgment a motion to disqualify the trial judge for bias was made. We agree with respondents that the motion was not timely made and that the bases for disqualification as disclosed by the affidavit supporting the motion were inadequate. (See Michaels v. Superior Court (1960) 184 Cal.App.2d 820, 824.)

The judgment is affirmed.

Brown (H. C.), J.

We concur in the judgment because of the bar created by the extreme delay of plaintiff.

Draper, P. J.

Scott, J.